IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATIONS NO. 43 AND 44 OF 2003.

CRIMINAL REVISION APPLICATION NO. 43/2003

Shri Dattakumar S. Desai,
P.W.D. Contractor,
Gasper Noronha Bldg.,
House No.A-2, Vidyanagar,
Margao, Goa. ... Petitioner.

VERSUS

1. M/s Akbar Leminates,
   through its partner,
   Shri Akbar Mulla,
   married, businessman,
   resident of Shiroda, Goa.

2. State of Goa,
   Through P.P. ... Respondents.

CRIMINAL REVISION APPLICATION NO. 44 OF 2003.

Shri Dattakumar S. Dessai,
P.W.D. Contractor,
Margao, Goa. ... Petitioner.

VERSUS

1. M/s. K.J. Traders,
   through its partner,
   Shri Akbar Mulla,
   resident of Shiroda, Goa.

2. State of Goa,
   Through P.P. ... Respondents.

Shri V.A. Lawande, Advocate for the Petitioners.

Mr. Rohit Bras de Sa, Advocate for the Respondent No.1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No.2.

CORAM: P.V. HARDAS, J.

DATE: 12TH FEBRUARY, 2004.

ORAL JUDGMENT:

The Applicant being aggrieved by the Judgment of the learned Sessions Judge, Panaji, dismissing the appeals and confirming the conviction and sentence passed by the learned Judicial Magistrate, First Class, Ponda, has filed the present revisions. Since the complainant and the accused are the same in both the revisions, and both relate to the bouncing of cheques and as the learned Trial Court had recorded common evidence, both these revisions are being disposed of by this common judgment.

2. Criminal Revision Application No.43/2003 arises against the judgment of the learned Sessions Judge, North Goa at Panaji, dated 16th August, 2003 in Criminal Appeal No.12/2002. The Applicant/Accused had been convicted by the learned Judicial Magistrate, First Class, Ponda, by Judgment dated 27th December, 2001, rendered in Criminal Case No.86/NIA/96/D for an offence punishable under Section 138 of the Negotiable Instruments Act and had sentenced the applicant/accused to undergo S.I. for one month and to pay a fine of Rs.5000 with a default sentence of S.I. for one month in the event of non-payment of fine. The learned Judicial Magistrate First Class had also awarded compensation of

Rs.50,000/- to the complainant.

3. Criminal Revision Application No.44/2003 arises against the judgment of the Sessions Judge, North Goa at Panaji dated 16th August, 2003 in Criminal Appeal No.13/2002, confirming the conviction and sentence passed by the learned Judicial Magistrate First Class, at Ponda. The learned Judicial Magistrate, First Class at Ponda by judgment dated 27th December, 2001, rendered in Criminal Case No.86/NIA/96/D had convicted the applicant/accused for an offence punishable under Section 138 of the Negotiable Instruments Act and had sentenced him to undergo S.I. for one month and to pay a fine of Rs.5000 with default sentence of S.I. for one month in the event of non-payment of fine and had also awarded compensation of Rs.50,000/- to the complainant. The applicant/accused has deposited the fine amount of Rs.5000/- in each case, but however has not deposited the compensation awarded to the complainant.

4. The respondent no.1/original complainant had filed Criminal complaint under Section 138 of the Negotiatible Instruments Act before the Judicial Magistrate First Class at Ponda. The complaints filed by the respondent/complainant were registered

as Criminal Case No.85/NIA/96/D and Criminal Case No.86/NIA/96/D. The allegations in the complaint, in respect of the offence, were that the complainant/firm which was dealing in hardware material had supplied hardware material to the applicant/accused on instalment basis. The material supplied to the applicant/accused were worth Rs.1,00,000/- and towards discharge of his liability the applicant/accused had issued two cheques, each of Rs.50,000/- dated 11.5.96 drawn on the Goa State Cooperative Bank, Borda, Margao. On deposit of the said cheques with the Bank of the complainant, on 9.11.96, the cheques were returned back unpaid with the endorsement: "Refer to Drawer". In response to a written notice the accused had not paid the amount and therefore the complaint against the accused came to be filed. The two cheques issued by the accused are at Exh.PW1/A Colly. The memo by which the cheques were returned is at Exh.PW1/A Colly. The copy of the legal notice along with the A.D. Card is at Exh.PW1/C Colly.

5. During the evidence the complainant did admit that the accused had paid an amount of Rs.10,000/- on two occasions in each case. The accused had also given two cheques of Rs.25,000/- each which had also bounced. The complainant also admitted that the

accused had thereafter made payment of Rs.5000/- in each case. Thus the complainant had received an amount of Rs.50,000/- towards the liability of the accused to pay Rs.1,00,000/-.

6. The defence of the accused appears to be that the said cheques worth Rs.1,00,000/- were issued to the complainant as security for ensuring the payment of the amount due. According to the accused he had paid to the complainant an amount of Rs.60,000/- and only an amount of Rs.40,000/- remained to be paid. The complainant had clandestinely presented the cheques and had filed a false case. A suggestion in this regard was put to the complainant which was denied by the complainant. During the cross-examination of P.W.1, P.W.1 did admit to have received a reply from the accused and which was marked at Exh.PW1/D. The complainant also admitted not to have stated either in his complaint or in his evidence that he had received a reply from the accused at Exh.PW1/D. The two courts below, on consideration of the evidence, found that taking into consideration the presumption available to the complainant under Section 139 of the Negotiable Instruments Act, the complainant had proved the offence against the applicant/accused beyond reasonable doubt. Both the Courts below also found

that the applicant/accused, who had not either examined himself or any other witness, had not been able to rebut the presumption against him.

7. Mr. V.A. Lawande, learned counsel appearing on behalf of the applicant-accused has raised two grounds. Firstly, according to him, the learned Magistrate has committed a serious illegality in recording common evidence in both the cases. According to him P.W.1 has deposed about both the cheques in Criminal Case No.85/NIA/96/D. The learned Magistrate has placed on record a carbon copy of the deposition in Criminal Case No.86/NIA/96. Thus according to the learned counsel for the applicant, this illegality vitiates the trial. Secondly, it is urged before me that the fact that the complainant had suppressed the receipt of the notice sent by the accused and had ultimately admitted to have received the said notice, the contention of the accused that he had paid Rs.60,000/- to the complainant deserves to be accepted and thus the presumption would stand rebutted.

8. Mr. Rohit Bras de Sa, the learned counsel appearing for the complainant has contended that the two courts below have recorded a finding of fact and there is no perversity in the reasoning of the two

courts below to warrant any interference in the exercise of the revisional jurisdiction by this Court. He has further stated that though the learned Trial Court, apparently has recorded common evidence, the complainant has cross-examined P.W.1 in respect of both the cheques and thus the complainant is not prejudiced in any manner. It is then contended by the learned counsel for the respondent that merely because P.W.1 had stated that he had not received the reply and then subsequently admitted to have received the reply, that by itself would not be enough to rebut the presumption. The accused has not proved the contents of the notice nor he has proved the factum of payment of Rs.50,000/-. He thus submits that the revision applications be dismissed.

9. It is true, unfortunately, that the learned Magistrate has recorded common evidence in both the cases. The learned Magistrate ought to have recorded separate evidence in each of the cases. However, it appears that P.W.1 has deposed in respect of the averments in both the cases, in his deposition recorded in Criminal Case No.85/NIA/96. P.W.1 has been extensively cross-examined on behalf of the accused in respect of the averments in both the cases. Unfortunately the carbon copy of the deposition of P.W.1 has been placed on record as

deposition of P.W.1 in Criminal Case No.86/NIA/96. This procedure is highly irregular. But howsoever, irregular the procedure may be, the accused is not prejudiced by the procedure adopted by the learned Trial Court as the accused has extensively cross-examined P.W.1 in respect of the averments in both the cases. This is not an irregularity which has vitiated the trial. Therefore, according to me, though the learned Trial Court had adopted an irregular procedure, neither the trial nor the conviction and sentence are vitiated. Therefore, according to me, the submission of the learned counsel for the applicant is devoid of any merit.

10. Turning to the second submission, it is true that P.W.1/complainant had not stated either in the complaint or in the examination-in-chief that a reply had been received from the accused to the notice sent by the complainant. P.W.1 however has admitted in the cross-examination to have received the reply from the accused. The said reply is at Exh.PW1/D. Merely because the witness has stated, assuming it to be so, a falsehood, the entire evidence of the witness cannot be jettisoned. The doctrine of falsus in uno falsus in omnibus cannot be applied with rigor to support the contention of the learned counsel for the applicant to jettison the evidence of P.W.1. It is a

fact that in the reply of the accused at Exh.PW1/A the accused had stated that he had paid an amount of Rs.60,000/- to the complainant and only a balance amount of Rs.40,000/- remained to be paid. However, mere assertion in the reply of the accused would not be sufficient for rebutting the presumption under Section 139 of the Negotiable Instruments Act. It is the defence which is spelt out in the reply of the accused. However, the accused has not been able to prove the defence either by way of obtaining admissions in the cross-examination of P.W.1 or by leading evidence of witnesses in defence. The accused had neither examined himself nor had he examined any other witness in support of his case. Therefore, according to me, the presumption under Section 139 of the Negotiable Instruments Act does not stand rebutted and the second contention advanced on behalf of the applicant/accused is also devoid of any substance.

11. After having given anxious consideration to the rival submissions and the evidence on record, I am of the view that no interference is required in the finding of conviction recorded by the two Courts below. The two Courts below have appreciated the evidence and have recorded a finding regarding the guilt of the applicant/accused. There is no

perversity in the reasoning of the learned Trial Court. I have perused the evidence of P.W.1 in order to satisfy myself that no material evidence has been overlooked. According to me the two courts below have rightly come to the conclusion that the applicant/accused is guilty of the offence with which he was charged. However, admittedly the applicant-accused, during the pendency of the case before the learned Trial Court had paid to the complainant an amount of Rs.50,000/-. Thus from the total outstanding liability, the applicant/accused had paid Rs.50,000/- . Only an amount of Rs.50,000/- remained to be paid. The learned trial Court has awarded compensation of Rs.50,000/- to the complainant in each case. In such circumstances, according to me, the consecutive sentence of S.I. for one month in each case is extremely harsh. According to me, in view of the payment of an amount of Rs.50,000/- to the complainant during the trial, which would act as a mitigating circumstance, according to me therefore the sentence of S.I. for 15 days in each of the cases would meet the ends of justice.

12. Accordingly, the conviction of the applicant/accused is maintained as also the order of compensation and sentence of fine and the default

sentence. However, the substantive sentence of S.I. for one month in each case is modified to S.I. for 15 days in each case. The substantive sentences shall run concurrently.

13. With these modifications in the sentences, the Criminal Revision Applications are partly allowed. Four weeks time granted to surrender. Bail Bonds stand cancelled.

P.V. HARDAS, J.

sl.